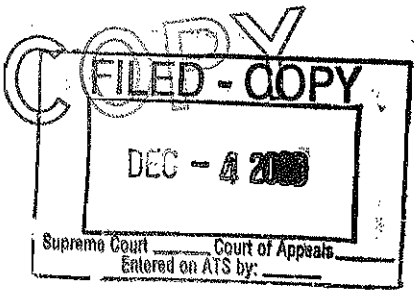
12-4-2009

State v. Beavers Appellant's Brief Dckt. 36183

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MARK BEAVERS, Defendant-Appellant.	)	NOS. 36183 & 36191 APPELLANT'S BRIEF



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

After police raided his home and discovered harvested still-growing marijuana, Mark Beavers was charged with trafficking in marijuana and possessing marijuana with the intent to deliver it. This was the First Case. While Mr. Beavers was out on bond, awaiting trial, in the First Case, he sold additional marijuana to an undercover police officer, was arrested, and had his car and his automobile searched. Again, police found harvested and still-growing marijuana. This time, he was charged with delivery of marijuana, possession of marijuana with the intent to deliver it, and trafficking in marijuana. In separate trials, where Mr. Beavers attempted (largely unsuccessfully) to present necessity defenses (on the basis that the marijuana seized in both cases was intended for his personal use and was necessary to treat his various medical conditions), but was thwarted to varying degrees by the respective district courts, Mr. Beavers was found guilty. At a joint sentencing hearing, the district court ruled that Mr. Beavers' sentences in the Second Case could be enhanced based on his "prior convictions" in the First Case, and it imposed an aggregate sentence of twelve years, with three years fixed.

On appeal, Mr. Beavers presents three distinct claims of error: (1) the district court erred in the First Case by refusing to instruct the jury regarding the common law defense of necessity; (2) the district court erred in the Second Case by precluding Mr. Beavers from presenting evidence in support of a necessity defense and by refusing to instruct the jury regarding that defense; and (3) the district court erred at the joint sentencing hearing insofar as it concluded that Mr. Beavers' sentences in the Second Case could be enhanced by convictions in the First Case, even though no convictions

had actually been entered in the First Case as of the time that Mr. Beavers allegedly committed the offenses at issue in the Second Case. In light of these errors, Mr. Beavers respectfully requests new trials in both cases or, in the alternative, a new joint sentencing hearing.

Statement of the Facts and Course of Proceedings

On August 13, 2006, based on a claim that the odor of marijuana was coming from Mark Beavers' property in Coeur D'Alene, police obtained a warrant authorizing a search of Mr. Beavers' property and vehicles.[1] (R., pp.32-26.)[2] In executing that warrant later the same day, officers found a number of marijuana plants growing in Mr. Beavers' two greenhouses, a couple additional marijuana plants in Mr. Beavers' basement, and, primarily in Mr. Beavers' kitchen, various vessels containing loose marijuana. (R., pp.37-38.) Officers also found literature about marijuana, paraphernalia for smoking marijuana, and two scales. (R., pp.30, 37-38.)

Based on the items discovered in his home, Mr. Beavers was arrested at the scene (R., p.43) and, on or about August 28, 2006,[3] was charged, in Kootenai County

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[1] The officer requesting the search warrant presented additional information in support of his request, one piece of which was considered by the magistrate who eventually authorized the warrant. (*See* Search Warrant Hearing Tr., p.12, L.10 – p.13, L.17.) That additional piece of information consisted of the officer's claim that Mr. Beavers' power records showed "cycles that are unusual for a normal usage. They start low, they continually grow higher until they peak, and then suddenly drops off and that cycle starts over. This, through my training and experience, is very indicative of marijuana grow power usage." (Search Warrant Hearing Tr., p.5, Ls.1-6.) However, the district court later concluded that this particular piece of information were "false and reflected a reckless disregard for the truth." (R., pp.230-33.)

[2] The district court filings from the two cases consolidated in this appeal have been combined by the district court clerk into a single Clerk's Record.

[3] The discrepancy between the arrest date and the date of the filing of the complaint appears to stem from the fact that the State dismissed its original case against

Case No. CR-06-18813 (*hereinafter,* First Case), with two counts of trafficking in marijuana—one count for possessing more than 25 pounds of marijuana and one count for possessing 25 or more marijuana plants—and one count of possession of marijuana with the intent to deliver. (R., pp.50-51; *see also* R., pp.66-67 (October 10, 2006 Information).)

On September 26, 2007, well in advance of Mr. Beavers' trial in the First Case, he submitted his requested jury instructions. (R., pp.244-50.) They included a request for an instruction of the affirmative defense of necessity. (R., pp.247-48.)

Not long after Mr. Beavers had requested a jury instruction on the necessity defense, the State moved *in limine* to preclude Mr. Beavers from offering any evidence concerning his need to use marijuana for medicinal reasons. (R., pp.258-59.) At a hearing of November 8, 2007, the district court heard arguments on that motion. (*See generally*, Tr. Vol. I, p.121, L.2 – p.134, L.23.)[4] At that hearing, the parties' counsel debated the availability of a necessity defense where the defendant is charged with trafficking and possession with intent to deliver, not just simple possession (*see* Tr. Vol. I, p.121, L.22 – p.133, L.5), but the district court ultimately denied the State's motion *in*

Mr. Beavers, and immediately re-filed, all in an effort to circumvent Mr. Beavers' right to a speedy preliminary hearing. (*See* R., p.23.)

[4] There is a number of transcripts in the Record on Appeal in this consolidated appeal. The longest one, consisting of approximately 20 different court proceedings, including the June 16-19, 2008 trial in the First Case, and the January 30, 2009 joint sentencing hearing, is referenced herein as "Tr. Vol. I"; the transcript of the proceedings of January 14, 2008 is referenced as "Tr. Vol. II"; the transcript of the proceedings of March 3, 2008 is referenced as "Tr. Vol. III"; the transcript of the proceedings of May 12, 2008 is referenced as "Tr. Vol. IV"; the transcript of the proceedings of October 28, 2008, the first day of the trial in the Second Case, is referenced as "Tr. Vol. V"; and the transcript of the proceedings of October 29-30, 2008, the second and third days of the trial in the Second Case, is referenced as "Tr. Vol. VI."

limine because, at the very least, Mr. Beavers might be requesting a jury instruction on the lesser-included offense of simple possession. (Tr. Vol. I, p.133, L.6 – p.134, L.23.)

In the midst of Mr. Beavers' June 2008 trial, after the State had rested, the State presented a new, but closely related, motion *in limine*. This time, the State requested that Mr. Beavers be precluded from offering any testimony concerning "his medical condition and things tied to his medical condition and treating it with marijuana," and, further, asking the district court not to instruct the jury on the defense of necessity. (Tr. Vol. I, p.779, L.8 – p.780, L.22.) Instead of arguing that the necessity defense was unavailable to Mr. Beavers as a matter of law based on the nature of the charges, this time the State focused on what it perceived to be a lack of evidence to support the necessity defense. (*See* Tr. Vol. I, p.783, Ls.15-25.) The crux of the State's argument was that "the burden is going to be on Mr. Beavers to prove a necessity defense, and there is no indication from all the discovery in the file and all the discussions with counsel that Mr. Beavers is going to be able to meet that threshold requirement to submit a necessity instruction to the jury." (Tr. Vol. I, p.780, Ls.7-12.) However, once again, the district court denied the State's motion *in limine*. (Tr. Vol. I, p.785, L.9 – p.787, L.10.) It indicated that it would not limit the defendant's ability to present his defense, especially where evidence of Mr. Beaver's medicinal use of marijuana was relevant to whether he had the intent to deliver marijuana, as charged in Count III of the State's Information; instead, it indicated that it would decide, after all the evidence had been presented, whether to instruct the jury on the necessity defense. (Tr. Vol. I, p.785, L.25 – p.787, L.10.)

In light of the district court's ruling allowing him to present his defense, he offered extensive testimony concerning his health problems and his medicinal use of marijuana. Mr. Beavers testified that, approximately twelve years earlier, he began suffering acute gastrointestinal distress, "having pain and discomfort in the rectal area" and "passing blood and some kind of fluid." (Tr. Vol. I, p.791, L.17 – p.792, L.1.) He further testified that this condition worsened to where he became incontinent and had to begin wearing a diaper, and that the incontinence grew to become a daily occurrence. (Tr. Vol. I, p.792, L.2 – p.793, L.4.) Mr. Beavers indicated that, as his gastrointestinal problems worsened, he also developed frequent, severe headaches. (Tr. Vol. I, p.792, Ls.4-11.) Eventually, Mr. Beavers began suffer fatigue and depression as well. (Tr. Vol. I, p.793, Ls.16-20.) Mr. Beavers testified that his cramps, aches, and pains quickly became debilitating, such that he was unable to work. (Tr. Vol. I, p.793, L.13 – p.794, L.5.)

Mr. Beavers testified that, initially, although he feared that he had cancer, he did not seek professional medical care for his symptoms because he had no medical insurance and could not afford to pay for medical care out of his own pocket. (Tr. Vol. I, p.794, L.20 – p.795, L.6, p.798, Ls.6-16.) Accordingly, Mr. Beavers took a holistic, naturopathic approach to attempting to improve his health. (Tr. Vol. I, p.795, Ls.7-20.) He improved his diet by giving up prepared foods in favor of home-cooked meals prepared with organic ingredients and containing more fruits and vegetables; he starting doing yoga and meditating; and he began exercising regularly. (Tr. Vol. I, p.795, L.21 – p.796, L.25.) While these measures, undoubtedly helped Mr. Beavers, they did not cure him. (Tr. Vol. I, p.797, Ls.1-4.) Thus, after months of research and self-study, he began growing marijuana to use as medicine. (Tr. Vol. I, p.797, L.5 – p.799, L.4.) Initially,

Mr. Beavers smoked the marijuana he grew; however, as his research progressed, he came to believe that his health problems could be better managed by also integrating marijuana into his diet. (Tr. Vol. I, p.800, Ls.12-19.) He learned that the "bud material [from the marijuana plant] is really more appropriately smoked," and that the leaf material (the "shake") "has its best medicinal effect when you process it and you put it in the food and eat it." (Tr. Vol. I, p.805, Ls.5-15.) Furthermore, because the "the effects [of these alternative means of ingestion] are very different" (Tr. Vol. I, p.805, Ls.14-15), and they affected Mr. Beavers' various symptoms in different ways, Mr. Beavers used both methods of ingestion. (Tr. Vol. I, p.807, L.19 – p.808, L.4.) Mr. Beavers testified that this holistic, naturopathic approach to his medical condition seemed to work, as his dietary changes, exercise, and use of marijuana coincided with an improvement in his condition. (Tr. Vol. I, p.854, L.16 – p.856, L.7.)

At the conclusion of the evidentiary portion of the trial in Mr. Beavers' First Case, the district court combined Counts I (trafficking by possession of a certain weight of marijuana) and II (trafficking by possession of a certain number of marijuana plants), such that a single count of trafficking (written in the alternative, whereby the jury could find Mr. Beavers guilty of trafficking if it found that he possessed either the requisite weight or the requisite number of plants) would go to the jury.[5] (R., p.540; *see also* Tr. Vol. I, p.886, L.16 – p.889, L.7 (State's objection to the district court's combination of the two counts, and district court's explanation of its reasoning for doing so).)

[5] The district court's decision to combine Counts I and II into a single count of trafficking had no effect on Count III (possession with intent to deliver), which also went to the jury as originally charged. (*See* R., pp.547-49.)

At this point in the trial, the district court also indicated that it would not be instructing the jury on the defense of necessity. (*See* Tr. Vol. I, p.889, L.23 – p.895, L.9.) The district court stated its reasoning as follows:

> [T]he test is an objective standard. In other words, the subjective testimony of the defendant would be insufficient to establish the, in and of itself, would be insufficient to establish as a matter of law that the evidence in the record supported the giving of a [necessity] defense [instruction]. I would agree that in State versus Hastings there is nothing there to indicate that the medical necessity defense would not be [available] . . . with regard to a trafficking charge.
>
> However, in this case the Court is concluding that certainly with regard to the trafficking charge there is no—under no objective standard is there any evidence here that would indicate that the amounts involved were necessary in order to treat the condition. So the Court is pretty comfortable with an absolute absence of evidence with regard to that element on the trafficking charge.
>
> With regard to a lesser included of simple possession of marijuana, should the jury get to that, the question is a closer one because of the State versus Hastings case, but again because of the uncontroverted evidence with regard to the amounts here and the lack of evidence with regard—other than subjective testimony of the defendant himself which of course is certainly pertinent and relevant on a *mens rea* element of why he is possessing the substances, doesn't establish, in the Court's view, sufficiency of the evidence to meet the elements of the defense, either the specific threat of immediate harm or that the same objective could not be accomplished by significantly smaller amounts or, for that matter, some other alternative method that is available.
>
> So the Court's ruling even on the lesser included of the possession charge, should the jury get to that, while State versus Hastings certainly indicates that the necessity defense is not barred as a matter of law, that has not been the ruling by this court. The Court has ruled specifically over the state's objection that the necessity defense was available. It is the Court's view that the proof in this case is insufficient as a matter of law to justify granting—giving the instruction of common law necessity defense, even with regard to the lesser of the simple possession of marijuana, and certainly it does not apply to the trafficking charge.

(Tr. Vol. I, p.893, L.14 – p.895, L.6.) Indeed, the district court ultimately instructed the jurors that they could not even consider a necessity defense. It instructed them as follows:

> Evidence of medical need has been admitted as it may be relevant to contest the issue of intent to deliver, which is an element in the count charging Possession of Marijuana with Intent to Deliver, by showing that defendant possessed the marijuana only for his own personal use. Do not consider such evidence for any purpose except the limited purpose for which it is admitted.

(R., p.550; Tr. Vol. I, p.901, Ls.11-18.) Further exacerbating this problem, in her closing argument, the prosecutor argued to the jury that this case "is not about whether marijuana is a good way or legitimate way to treat medical issues." (Tr. Vol. I, p.909, Ls.1-3.)

Ultimately, on June 19, 2008, the jury in the First Case found Mr. Beavers guilty of trafficking for possessing between five and 25 pounds of marijuana,[6] and of possession of marijuana with the intent to deliver. (R., pp.562-63; Tr. Vol. I, p.961, L.2 – p.963, L.16.) Mr. Beavers would not be sentenced in the First Case until much later.

* * * * *

In the meantime, on November 20, 2007, while Mr. Beavers was apparently out of jail on bond awaiting his trial in the First Case, the police were able to use a confidential informant[7] to set up a controlled buy between Mr. Beavers and an

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[6] The jury acquitted Mr. Beavers on the greater charge that he had possessed more than 25 pounds of marijuana (R.,p.562), and it never reached the question of whether Mr. Beavers committed the lesser offense of possessing between 25 and 50 marijuana plants (R., p.563).

[7] The confidential informant was Catherine Johnson, a woman that Mr. Beavers knew from her volunteer work with The Hemp and Cannabis Foundation (*hereinafter,* THCF), a "health and wellness support group for medical marijuana patients" where those patients can "exchange medical information" and obtain "safe access, to network with each other to help them get their medicine." (Tr. Vol. VI, p.6, L.6 – p.7, L.5.) THCF is

undercover detective posing as someone with a medical need for marijuana. (*See* R, p.276; Tr. Vol. VI, p.23, L.1 – p.24, L.11.) The controlled marijuana buy occurred the following day and, immediately afterward, Mr. Beavers was arrested and his car searched. (R., p.276.) In the search of Mr. Beavers' vehicle, police found marijuana in a suitcase in his trunk. (R., p.276.) Police then obtained a new search warrant for Mr. Beavers' home and, in executing that warrant, located additional marijuana plants on Mr. Beavers' property. (R., pp.276-77.)

Based on the events of November 21, 2007, Mr. Beavers was initially charged, in Kootenai County Case No. CR-07-27416 (*hereinafter,* Second Case), with one count of delivery of a controlled substance (marijuana) and one count of possession of a controlled substance (marijuana) with the intent to deliver. (R., pp.271-72.) However, it was not long before the State filed an amended complaint adding a third count: trafficking in marijuana (for possessing more than 25 marijuana plants). (R., pp.299-300.)

On December 21, 2007, following a contested preliminary hearing where Mr. Beavers was ultimately bound over on all three charged offenses (*see* R., p.326), the State filed its Information. (R., pp.327-29.) Included in that Information were a host of alleged sentencing enhancements, particularly described as follows:

- In Part II, the State pled the sentencing enhancement codified at I.C. § 37-2739 (which would allow for sentences up to twice the sentences

based in Portland, Oregon, but it holds a clinic once per month in Spokane, Washington. (Tr. Vol. VI, p.80, Ls.10-25.) Notably, after meeting with Dr. Thomas Orville, M.D., a licensed physician, at THCF, Mr. Beavers received authorization to use marijuana for medicinal purposes (in the State of Washington). (Tr. Vol. VI, p.79, L.21 – p.80, L.25; Defendant's Exhibit B.)

otherwise authorized on all three counts), alleging that Mr. Beavers "has previously *committed* a violation of the Uniform Controlled Substances Act and/or a violation of an Idaho [drug] statute . . . ." (R., p.328 (emphasis added).)

- In Part III, the State pled the sentencing enhancement codified at I.C. § 37-2739A (which would call for a mandatory minimum three-year fixed consecutive sentence on the delivery charge), alleging that Mr. Beavers "has within the last ten (10 years *committed* one or more felony offenses of dealing, selling, or trafficking in controlled substances . . . ." (R., pp.328-29 (emphasis added).)
- In Part IV, the State pled the sentencing enhancement codified at I.C. § 37-2732(B)(a)(7)[8] (which would call for a mandatory minimum sentence twice that which was otherwise required on the trafficking charge), alleging that Mr. Beavers "has previously *committed* a trafficking offense . . . ." (R., p.329 (emphasis added).)
- In Part V, the State pled the sentencing enhancement codified at I.C. § 19-2514 (which would call for minimum sentences of five years, and in increase in the maximum punishments to life, for all three counts),

[8] The State's original Information, as well as the subsequent Amended Information, cited I.C. § 37-2739B(a)(7) for the sentence enhancement alleged in Part IV. (*See* R., pp.329 (original Information), 588 (Amended Information).) However, there is no section 37-2739B(a)(7) in the Idaho Code. Apparently this was a typographical error on the State's part. (*See* Tr. Vol. VI, p.213, L.5 – p.214, L.4.) Accordingly, near the end of Mr. Beavers' trial in the Second Case, the district court granted the State leave to amend the information to state the correct code section: I.C. § 37-2732B(a)(7). (Tr. Vol. VI, p.218, Ls.1-4, 19-24.)

alleging that has "been previously *charged* with at least two (2) separate felony offenses" and, thus, is a "persistent violator" under Idaho law. (R., p.329 (emphasis added).)

Notably, all four of the enhancements charged in the State's December 21, 2007 Information in the Second Case were based on the offenses *alleged* in the First Case, which the State acknowledged was "still pending," and for which Mr. Beavers' trial was still nearly six months away. (R., pp.328-29.)

On October 28, 2008, the first day of trial, the State filed an Amended Information.[9] (R., pp.586-89.) It appears that the only change made was that, with regard to each of the four sentencing enhancements pled, the State removed the words "still pending" from the references to alleged prior offenses (because, of course, by this time, the trial had finally occurred in the First Case, even if Mr. Beavers had not yet been sentenced and no formal judgment of conviction had been entered). (*Compare* R., pp.327-29 (original Information) *with* R., pp.586-89 (Amended Information).)

In the meantime, on October 27, 2008, the day before Mr. Beavers' trial was set to begin, the State had filed a motion *in limine*, identical that which it had filed in the First Case, asking the district court to preclude Mr. Beavers from offering any evidence concerning his need to use marijuana for medicinal reasons. (R., pp.576-77; *see also* R., pp.580-83 (supporting memorandum).) The State's motion was based upon Idaho Rules of Evidence 401, 402, and 403. (R., p.577.) Particularly, the State argued that the evidence in question was not relevant because "medical necessity/authorization is not a defense to the charged offenses" of delivery, possession with intent to deliver, and

trafficking (R., pp.581-82), and that it was unfairly prejudicial, confusing, and misleading "because such evidence would give a jury the impression that it could somehow consider such evidence in reaching a determination on Defendant's guilt, when a jury clearly can not . . . ." (R., p.582.) Alternatively, the State argued, even if a necessity defense was available to Mr. Beavers, he could not (in the State's view, and in the view of the judge who presided over the trial in the First Case) satisfy the elements of the defense and, therefore, he should not even be allowed to try in this case. (R., pp.582-83.)

On the morning of the first day of trial in the Second Case, the district court[10] discussed the State's motion *in limine*. (*See* Tr. Vol. V, p.83, L.13 – p.93, L.12.) It indicated that, if the defense could meet its burden of production with regard to the necessity defense, it would allow the defense's evidence to be heard by the jury and it would instruct the jury on that defense; however, if the defense could not meet its burden of production, it would not even allow the defense to present its evidence to the jury, as that evidence would be irrelevant and inadmissible at that point. (Tr. Vol. V, p.83, L.13 – p.84, L.5, p.85, Ls.13-18.) The district court further indicated that, in order to determine whether the defense could meet its burden of production, it would allow the defense to make an offer of proof outside the presence of the jury. (Tr. Vol. V, p.84, Ls.6-12, p.84, L.19 – 85, L.1.)

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[9] It does not appear that the State ever sought, or received, leave of the district court to file its Amended Information on October 28, 2008. (*See generally* R.)

[10] A different district court judge presided over Mr. Beavers' trial in the Second Case than had presided over his trial in the First Case.

In accordance with the forgoing plan, on the second day of trial, after the State had rested its case-in-chief, the district court took up the matter of whether Mr. Beavers would be allowed to present a defense. (*See* Tr. Vol. VI, p.65, L.16 – p.132, L.21.) At the outset, the district court again explained that, unless the defense would be entitled to a necessity instruction, it would not be allowed to present any evidence as to Mr. Beavers' medicinal use of marijuana because that evidence would be "irrelevant and unfairly prejudicial, it would lead to the confusion of issues, it would mislead the jury, [and] be a waste of the jury's time." (Tr. Vol. VI, p.65, L.20 – p.66, L.8.) Thereafter, the district court heard the defense's offer of proof (in the form of sworn testimony from Mr. Beavers). (*See* Tr. Vol. VI, p.67, L.1 – p.120, L.5.) Mr. Beavers' testimony was very consistent with his testimony in the First Case. He testified about his various medical conditions (irritable bowel syndrome, internal hemorrhoids, Hepatitis B and C, hypertension, anxiety, depression, and angina attacks) and the symptoms associated with some of those conditions (anal bleeding and discharge, bowel discomfort, constipation, and severe headaches) (Tr. Vol. VI, p.67, L.19 – p.68, L.1, p.73, Ls.10-17, p.84, L.24 – p.85, L.7); he testified that his medical problems had had a tremendous impact on his life (Tr. Vol. VI, p.84, Ls.1-12); he testified that he was eventually granted authorization by the State of Washington to use marijuana for medicinal purposes (Tr. Vol. VI, p.79, L.4 – p.80, L.20); and he testified that the use of marijuana, especially combined with an improved diet and a regimen of exercise, yoga, and meditation, alleviates his symptoms and allows him to function again. (Tr. Vol. VI, p.83, Ls.16-25, p.85, L.21 – p.86, L.16, p.93, Ls.2-25, p.95, Ls.14-20, p.97, Ls.18-19, p.98, Ls.8-15). Mr. Beavers further testified that he had no health insurance (Tr. Vol. VI,

p.81, Ls.7-8), generally could not afford to see specialists or pay for emergency room visits (*see* Tr. Vol. VI, p.81, L.9 – p.82, L.23), and, when he did eventually seek traditional medical care for his condition, he received a medication that helped, but brought on a significant side effect (angina) that caused him to have to stop taking that medication. (Tr. Vol. VI, p.75, L.24 – p.79, L.5.)

Following the defense's offer of proof, the district court heard arguments as to whether Mr. Beavers' testimony would warrant a jury instruction on the defense of necessity and, if not, whether Mr. Beavers would be allowed to testify at all regarding his medical need for marijuana. (*See* Tr. Vol. VI, p.120, L.14 – p.132, L.21.) Ultimately, the district court decided that it would not be instructing the jury on the defense of necessity and, thus, Mr. Beavers could not even present to the jury his testimony concerning his medical need for marijuana. (Tr. Vol. VI, p.131, L.7 – p.132, L.21.) It reasoned as follows:

> [I]t's my opinion that . . . there's an absence of evidence that the defendant lacked adequate legal medical alternatives to the use of marijuana, that there's no reasonable evidence of any specific threat of any immediate harm to the defendant, that there's no reasonable evidence that the defendant could have prevented the threatened harm by any less offensive alternative such as the reasonable pursuit of medical attention, which I don't find he engaged in.
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> . . . . [I]n my opinion, any—I don't believe he reasonably pursued medical attention for the complaints he has. Certainly had he done so, he very well may have been able to receive legally prescribed medication for any psychological problem such as depression or anxiety or any medical condition that he complained of such as high blood pressure.
>
> There was no reasonable evidence submitted by the defense that, based upon the amount seized from the defendant an the number of plants involved and the fact that he was actually selling marijuana, that the harm caused by violating the law was less than the threatened harm. Certainly it's difficult to belief [sic] that he was simply growing for his own use when, at the same—if, at the same time as the evidence clearly shows, he was selling marijuana.

> So after having considered all the evidence submitted by the State during the trial as well as the evidence submitted by the defendant outside the presence of the jury, its my determination that there's no—that, in fact, no reasonable view of the evidence would support the giving of the instruction on [the] common law defense of necessity.

(Tr. Vol. VI, p.131, L.8 – p.132, L.21.)

In light of the district court's ruling, Mr. Beavers had virtually nothing to present in his own defense (*see* Tr. Vol. VI, p.134, L.1 – p.138, L.6 (Mr. Beavers' exceptionally brief direct testimony)), and the defense quickly rested. (*See* Tr. Vol. VI, p.147, Ls.22-23.)

At the final jury instruction conference, defense counsel lodged one final objection to the district court's refusal to allow Mr. Beavers to present his defense or have the jury instructed on the defense of necessity: "The necessity instruction. We have asked the Court to give that instruction. We object on the grounds of the deprivation of my client for a full and fair trial to present a full and vigorous defense on his behalf, and we would ask the Court to give the necessity instruction." (Tr. Vol. VI, p.155, Ls.5-10.) However, the district court was still not swayed, as it its final instructions to the jury contained no mention of the defense of necessity. (*See* R., pp.628-53.)

In light of all of this, the jury returned guilty verdicts on all three alleged offenses. (R., pp.655-56; Tr. Vol. VI, p.220, L.24 – p.221, L.23.) Thereafter, Mr. Beavers waived his right to a jury trial as to Parts II, III, and IV of the Amended Information,[11] and conditionally admitted the fact underlying the sentencing enhancements pled in those three parts of the Information, *i.e.*, the fact that he had been found guilty of both

[11] The State dismissed the "persistent violator" enhancement pled in Part V of the Information. (Tr. Vol. VI, p.228, Ls.23-24, p.232, Ls.15-19.)

trafficking in marijuana, and possession of marijuana with the intent to deliver, in the First Case. (*See* Tr. Vol. VI, p.223, L.17 – p.233, L.17.) Although he admitted that fact that he had been found guilty in the First Case, Mr. Beavers specifically preserved his right to argue, as a legal matter, that the verdicts in the First Case could not be used to enhance his sentences in the Second Case. (Tr. Vol. VI, p.224, L.24 – p.225, L.6.)

* * * * *

The First Case and the Second Case were consolidated for purposes of sentencing. January 21, 2009 was the original setting for that sentencing hearing; however the State requested a continuance so as to have time to submit a sentencing memorandum setting forth its arguments concerning how the charged enhancements ought to apply. (Tr. Vol. I, p.984, Ls.1 – p.985, L.12) Ultimately, the district court granted the State's request, observing that it could use some input from the parties in light of the fact that "the sentencing issues, as far as I can see on this case, it would maybe understate the situation to say it is complex." (Tr. Vol. I, p.987, Ls.1-12, p.987, L.25 – p.988, L.5.)

Two days later, on January 23, 2009, the State filed its sentencing memorandum. (R., pp.661-66.) In that memorandum, the State argued that Mr. Beavers' sentences in the Second Case were properly enhanced based on the jury's verdicts in the First Case because those verdicts constituted a prior "conviction." (R., pp.664-65.) In addition, the State presented arguments as to how it believed the various enhancements should apply. (R., pp.662-65.)

On January 29, 2009, Mr. Beavers filed his responsive sentencing memorandum. (R., pp.667-70.) In that memorandum, Mr. Beavers argued primarily that the guilty

verdicts in the First Case could not be used to enhance the sentences in the Second Case. (R., pp.667-70.) Mr. Beavers explained that, at the relevant time—the time when he allegedly committed the offenses charged in the Second Case—he had not previously been convicted of the drug crimes in question because he had not yet been sentenced for, or even found guilty of, those offenses. (R., pp.668-70.)

The next day, the district court held a lengthy sentencing hearing. (*See generally* Tr. Vol. I, p.997, L.1 – p.1076, L.7.) During the first phase of that hearing, the district court discussed, and heard arguments on, the law with regard to: the base sentences for the charged offenses; the question of whether those sentences could (or must) be enhanced under the facts of these cases; and, assuming the enhancements apply, how those enhancements would affect the base sentences. (*See* Tr. Vol. I, p.997, L.1 – p.1025, L.10.) With regard to the question of whether the jury's verdicts in the First Case could (or must) be used to enhance the sentences imposed in the Second Case, the district court ultimately ruled that the enhancements apply. (Tr. Vol. I, p.1024, L.3 – p.1025, L.10.)

During the second phase of the January 20, 2009 sentencing hearing, the district court went over corrections to the PSI, listened to Mr. Beavers' allocution, took arguments from the parties' counsel, and, ultimately, imposed the following sentences:

- Trafficking by possessing between 5 and 25 pounds of marijuana (in the First Case): six years, with three years fixed;
- Possession of marijuana with the intent to deliver (in the First Case): five years, with one year fixed, concurrent;

- Delivery of marijuana (in the Second Case): Five years, with two years fixed, concurrent;
- Possession of marijuana with the intent to deliver (in the Second Case): Five years, with two years fixed, concurrent; and
- Trafficking by possessing up to 25 marijuana plants (in the Second Case): Twelve years, with two years fixed, concurrent.

(R., pp.681-82; Tr. Vol. I, p.1072, L.2 – p .1073, L.4.) Thus, Mr. Beavers' aggregate sentence is twelve years, with three years fixed. (Tr. Vol. I, p.1068, Ls.7-10, p.1072, Ls.3-5.)

On February 4, 2009, the district court entered a judgment of conviction bearing the case numbers of both the First Case and the Second Case. (R., pp.680-83.) Just over a week later, on February 13, 2009, Mr. Beavers timely filed notices of appeal in both cases.[12] (R., pp.689-91 (Notice of Appeal in Second Case); Notice of Appeal, Kootenai County No. CR-06-18813 (Feb. 13, 2009) (Notice of Appeal in First Case).[13]) On appeal, Mr. Beavers contends that the district court erred in the First Case by failing

[12] On March 6, 2009, the Idaho Supreme Court entered an order consolidating the appeals of the First Case and the Second Case.

[13] Undersigned counsel is currently in possession of an un-file-stamped copy of the Notice of Appeal in the First Case and, based on the district court's Register of Actions from the First Case, believes that a copy of that document was, in fact, filed with the district court on February 13, 2009. Undersigned counsel has been attempting to obtain a filed-stamped copy of said Notice or Appeal (which could then be attached to a motion to augment the Record on Appeal) from the district court but, as of the filing of this Appellant's Brief, has not yet received it. When a file-stamped copy of the Notice of Appeal is provided to undersigned counsel, Mr. Beavers will file a motion to augment the Record on Appeal with that document attached. If, however, the district court is unable, or unwilling, to provide the requested Notice of Appeal within a reasonable time, Mr. Beavers will file a motion to augment the Record on Appeal without the document attached, and will ask the Supreme Court to order the district court to provide that document.

to instruct the jury on the affirmative defense of necessity; it erred in the Second Case by refusing to allow Mr. Beavers to present evidence in support of his proffered necessity defense, and by refusing to instruct the jury on that defense; and it erred at the joint sentencing hearing by enhancing Mr. Beavers' sentences in the Second Case based on its finding that he had been previously convicted of certain drug offenses in the First Case.

ISSUES

1. Did the district court err in Mr. Beavers' First Case by refusing to instruct the jury on the affirmative defense of necessity?

2. Did the district court err in Mr. Beavers' Second Case by refusing to allow Mr. Beavers to present evidence in support of his proffered necessity defense, and by refusing to instruct the jury on that defense?

3. Did the district court err at Mr. Beaver's joint sentencing hearing by enhancing Mr. Beavers' sentences in the Second Case based on its finding that he had been previously convicted of certain drug offenses in the First Case?

ARGUMENT

I.

In Mr. Beavers' First Case, The District Court Erred In Failing To Instruct The Jury On The Affirmative Defense Of Necessity

A. Introduction

Mr. Beavers contends that the district court erred in denying his request that the jury in the First Case be instructed that, even if it found that Mr. Beavers possessed marijuana, it could find him not guilty on the basis of the common law defense of necessity based on the fact that his use of marijuana was necessary to treat his medical condition. He asserts that he met his burden of production as to the four elements of the defense by offering evidence that: (1) he faced a specific threat of immediate harm, *i.e.*, a debilitating gastrointestinal condition; (2) his gastrointestinal condition was not a product of his own doing; (3) he could not have obtained relief from his gastrointestinal condition by means other than the use of marijuana; and (4) the harm caused by using marijuana, if any, was not disproportionate to the suffering avoided.

B. Applicable Legal Standards

In *State v. Hastings*, 118 Idaho 854, 801 P.2d 563 (1990), the Idaho Supreme Court held that the common law defense of necessity is available to defendants claiming that they possessed and ingested marijuana for medicinal purposes. *Id.* at 854-55, 801 P.2d at 563-64. In *Hastings*, the Court outlined the four elements of the necessity defense:

1. A specific threat of immediate harm;
2. The circumstances which necessitate the illegal act must not have been brought about by the defendant;

3. The same objective could not have been accomplished by a less offensive alternative available to the actor;

4. The harm caused was not disproportionate to the harm avoided.

Id. at 855, 801 P.2d at 564.

As with any defense in Idaho, the defendant asserting a necessity defense bears "[t]he burden of production, *i.e.*, [the burden] of raising a *prima facie* defense . . . ." *State v. Camp*, 134 Idaho 662, 665-66 & n.2, 8 P.3d 657, 660-61 & n.2 (Ct. App. 2000). In other words, the defendant bears the burden of producing such evidence that "a reasonable view of the record support[s] the elements of his affirmative defense[ ] . . . ." *Id.* at 656-665-66, 8 P.3d at 660-61. The defendant, however, does not bear the burden of persuasion; once he has satisfied his burden of production, it is incumbent upon the State to disprove (under the "beyond a reasonable doubt" standard) his defense.[14] *See* I.C.J.I. 1512 (pattern jury instruction for the necessity defense, providing that "[t]he state must prove beyond a reasonable doubt that the defendant did not act because of necessity"); *cf. State v. Hansen*, 105 Idaho 816, 817 & n.1, 673 P.2d 416, 417 & n.1 (1983) (calling a jury instruction a correct statement of the law of entrapment where it indicated that it was the State's burden to disprove, beyond a reasonable doubt, the defendant's claim of entrapment).

[14] The burden of proof applicable to defenses in criminal cases is discussed in detail in the commentary provided with I.C.J.I. 1500. In that commentary, the Committee looks back more than 100 years, tracing the development of the law with respect to "affirmative" defenses, and opines that the mere fact that defenses in Idaho have traditionally been called "affirmative" defenses, "the general rule in Idaho is that the defendant in a criminal case has the burden of producing evidence regarding any defense, but he does not have the burden of persuasion. Once the defense is properly raised, the state must disprove it beyond a reasonable doubt." I.C.J.I. 1500 cmt.

With regard to the question of when the defendant is entitled to a jury instruction on his proffered necessity defense, it is well-settled that the applicable standard is couched in terms that are substantially the same as those used to describe his burden of production: "[a] defendant in a criminal action is entitled to have a legal theory of defense submitted to the jury through an instruction if there is a reasonable view of the evidence that would support the theory." *State v. Tadlock*, 136 Idaho 413, 414, 34 P.3d 1096, 1097 (Ct. App. 2001); *accord State v. Howley,* 128 Idaho 874, 878-79, 920 P.2d 391, 395-96 (1996). Thus, it is clear that the defendant seeking to place a necessity defense before the jury must present a *prima facie* case of necessity, *i.e.*, he must present sufficient facts such that there is a "reasonable view" of the evidence to support the elements of the defense; however, the defendant has no obligation to overcome the State's evidence.

Although the Idaho Supreme Court has said that "[t]he question of whether there is a reasonable view of the evidence that supports an instruction to the jury on the defense of necessity is [a] matter of discretion for the district court," *Howley*, 128 Idaho at 878, 920 P.2d at 395, this discretionary standard, and its attendant "abuse of discretion" standard on review, *see id.* at 879, 920 P.2d at 396, appears to be a misnomer. The question of whether a party has presented a *prima facie* case is typically judged under an objective standard and, thus, is typically considered to be a question of law, subject to *de novo* review. *See, e.g., State v. Rhode*, 133 Idaho 459, 461, 988 P.2d 685, 687 (1999) (holding that the denial of a motion for acquittal is reviewed *de novo*); *Peterson v. Parry*, 92 Idaho 647, 650-51, 448 P.2d 653, 656-57 (1968) (holding that a motion for dismissal under I.R.C.P. 41(6), which implicates the

question of whether the plaintiff met his burden of presenting a *prima facie* case, presents a question of law). Thus, it would seem that the Court of Appeals was correct when it held that "[w]hether proffered evidence is sufficient to make a *prima facie* showing of an affirmative [necessity] defense is a question of law which we freely review." *State v. Chisholm*, 126 Idaho 319, 321, 882 P.2d 974, 976 (Ct. App. 1994). This makes sense, of course, because the question of whether a jury was properly instructed on the law is *generally* considered a legal question, subject to *de novo* review on appeal. *Rhode*, 133 Idaho at 461, 988 P.2d at 687 ("The question of whether the jury was properly instructed is a question of law over which this Court exercises free review.") Accordingly, the language of *Howley* notwithstanding, Mr. Beavers' claim that the district court erred in denying his requested necessity defense instruction should be reviewed *de novo* by this Court.

C. Given The Facts Of Mr. Beavers' First Case, The District Court Should Have Instructed The Jury On The Affirmative Defense Of Necessity

Taking an objectively reasonable view of the evidence presented by the defense in this case, it is clear that Mr. Beavers satisfied his burden of production as to the four elements of the common law defense of necessity. Therefore, it was legal error for the district court to have declined to instruct the jury as to the availability and elements of that defense.

1. Mr. Beavers Presented Evidence Of A Specific Threat Of Immediate Harm, *i.e.*, A Debilitating Gastrointestinal Condition

As noted above, during the trial in the First Case, Mr. Beavers offered extensive testimony concerning his health problems. Mr. Beavers testified that, approximately twelve years earlier, he began suffering acute gastrointestinal distress, "having pain and

discomfort in the rectal area" and "passing blood and some kind of fluid." (Tr. Vol. I, p.791, L.17 – p.792, L.1.) He further testified that this condition worsened to where he became incontinent and had to begin wearing a diaper, and that the incontinence grew to become a daily occurrence. (Tr. Vol. I, p.792, L.2 – p.793, L.4.) Mr. Beavers indicated that, as his gastrointestinal problems worsened, he also developed frequent, severe headaches. (Tr. Vol. I, p.792, Ls.4-11.) Eventually, Mr. Beavers began suffer fatigue and depression as well. (Tr. Vol. I, p.793, Ls.16-20.) Mr. Beavers testified that his cramps, aches, and pains quickly became debilitating, such that he was unable to work. (Tr. Vol. I, p.793, L.13 – p.794, L.5.)

Surely, abdominal pain, coupled with ongoing rectal bleeding and severe headaches, all of which causes the sufferer to be completely incapacitated, is a "threat of immediate harm" within the meaning of *Hastings.* Indeed, the State never questioned Mr. Beavers' claim that his gastrointestinal condition constituted a "threat of immediate harm" (*see* R., pp.258-59 (State's motion *in limine*); Tr. Vol. I, p.124, L.4 – p.126, L.12 (State's arguments at the hearing on its motion *in limine*), p.132, L.2 – p.133, L.5 (same); (Tr. Vol. I, p.779, L.8 – p.780, L.20 (State's argument at trial seeking to preclude Mr. Beavers from testifying about his medical condition), p.783, L.15 – p.785, L.8 (same)), and the district court impliedly found that Mr. Beavers' gastrointestinal condition did constitute a "threat of immediate harm" (*see* Tr. Vol. I, p.893, L.14 – p.895, L.6 (finding that Mr. Beavers was not entitled to an instruction on the defense of necessity because he failed to explain how the *quantity* of marijuana allegedly found was necessary to remedy his condition)).

2. Mr. Beavers Presented Evidence Indicating That He Did Not Bring About The Harm (The Debilitating Gastrointestinal Condition) Necessitating His Illegal Act, *i.e.*, His Possession And Use Of Marijuana

Since the "specific threat of immediate harm" at issue in this case is Mr. Beavers' illness, it is obviously not something that he brought about on his own.

3. Mr. Beavers Presented Evidence Showing That The Same Objective, *i.e.*, A Modest Recovery, Could Not Have Been Accomplished By A Less Offensive Alternative, *e.g.*, Traditional Medicine, That Was Actually Available, *i.e.*, Affordable, To Him

For purposes of this case, the most critical element of the necessity defense is the requirement that the same objective could not have been accomplished by any less offensive alternatives that were actually available. Thus, in the context of this case, the operative question becomes whether Mr. Beavers could have satisfactorily treated his gastrointestinal condition through conventional medicine.

Keeping in mind that Mr. Beavers' burden was only to *produce evidence* on this point, not to *persuade* the finder of fact, he submits that he met his burden by presenting *prima facie* evidence that he had no choice but to use marijuana to treat his gastrointestinal condition. As noted, Mr. Beavers testified that he did not seek professional medical care for his symptoms because he had no medical insurance and could not afford to pay for medical care out of his own pocket. (Tr. Vol. I, p.794, L.20 – p.795, L.6, p.798, Ls.6-16.) Accordingly, Mr. Beavers was forced to take a holistic, naturopathic approach to dealing with his health. (Tr. Vol. I, p.795, Ls.7-20.) He improved his diet by giving up prepared foods in favor of home-cooked meals prepared with organic ingredients and containing more fruits and vegetables; he started doing yoga and meditating; and he began exercising regularly. (Tr. Vol. I, p.795, L.21 – p.796, L.25.) While these measures, undoubtedly helped Mr. Beavers, they did not cure him.

(Tr. Vol. I, p.797, Ls.1-4.) Thus, after months of research and self-study, he began growing marijuana to use as medicine. (Tr. Vol. I, p.797, L.5 – p.799, L.4.) Initially, Mr. Beavers smoked the marijuana he grew; however, as his research progressed, he came to believe that his health problems could be better managed by also integrating marijuana into his diet. (Tr. Vol. I, p.800, Ls.12-19.) He learned that the "bud material [from the marijuana plant] is really more appropriately smoked," and that the leaf material (the "shake") "has its best medicinal effect when you process it and you put it in the food and eat it." (Tr. Vol. I, p.805, Ls.5-15.) Furthermore, because the "the effects [of these alternative means of ingestion] are very different" (Tr. Vol. I, p.805, Ls.14-15), and they affected Mr. Beavers' various symptoms in different ways, Mr. Beavers used both methods of ingestion. (Tr. Vol. I, p.807, L.19 – p.808, L.4.) Mr. Beavers testified that this holistic, naturopathic approach to his medical condition seemed to work, as his dietary changes, exercise, and use of marijuana coincided with an improvement in his condition. (Tr. Vol. I, p.854, L.16 – p.856, L.7.)

Although the district court concluded that Mr. Beavers was not entitled to a necessity instruction "because of the uncontroverted evidence with regard to the amounts" at issue, the district court's focus was misplaced. First, the amounts at issue were not "uncontroverted"; in fact, in his own testimony, Mr. Beavers challenged the State's claim that he possessed more than 25 pounds of marijuana. (Tr. Vol. I, p.822, L.23 – p.823, L.823, L.6, p.841, L.20 – p.842, L.3.) (And, indeed, the jury ultimately found that he possessed less than the 25 pounds alleged by the State. (R., pp.562-63.)) Second, and more importantly, the district court's comments make it clear that it was improperly weighing Mr. Beavers' testimony against the State's evidence and

concluding that Mr. Beavers' story simply was not credible. In essence then, the district court's ruling was based on its erroneously placing the burden of *persuasion* on Mr. Beavers. Had the district court applied the correct standard—the production of evidence standard—it would have had to have concluded that Mr. Beavers' presented *prima facie* evidence that he could not have treated his illness without marijuana, and it would have been up to the jury to decide whether that evidence was credible.

4. Mr. Beavers Presented Evidence Supporting The Conclusion That The Harm Caused, *i.e.*, Commission Of A "Victimless" Crime Of Morality, Was Not Disproportionate To The Harm Avoided, *i.e.*, Mr. Beavers' Continued Suffering And Incapacitation

Although the State can undoubtedly argue some sort of theoretical "societal harm" argument to try to justify the criminalization of the growing, possession, and use of marijuana, the fact is that, in this case, there is simply no evidence of anyone having actually been harmed by Mr. Beavers' medicinal use of marijuana. Moreover, given the harm avoided—Mr. Beavers' continued suffering and incapacitation—it simply cannot be said that the societal harm (assuming there is some) is disproportionate to the suffering that Mr. Beavers avoided.

II.

The District Court Erred In Mr. Beavers' Second Case By Refusing To Allow Mr. Beavers To Present Evidence In Support Of His Proffered Necessity Defense, And By Refusing To Instruct The Jury On That Defense

A. Introduction

Mr. Beavers contends that the district court erred in the Second Case by denying him the opportunity to present evidence concerning his health conditions and his medical need for marijuana, and in declining to instruct the jury that, even if it found that

Mr. Beavers possessed marijuana, it could nevertheless find him not guilty of trafficking based on the common law defense of necessity because his use of marijuana was necessary to treat his medical condition. He asserts that he met his burden of production as to the four elements of the defense by offering evidence that: (1) he faced a specific threat of immediate harm, *i.e.*, debilitating illness; (2) his medical condition was not a product of his own doing; (3) he could not have obtained relief from his medical condition by means other than the use of marijuana; and (4) the harm caused by using marijuana, if any, was not disproportionate to the suffering avoided.

B. Applicable Legal Standards

As discussed in Part I.B, above, the common law defense of necessity is available to defendants claiming that they possessed and ingested marijuana for medicinal purposes, *Hastings*, 118 Idaho at 854-55, 801 P.2d at 563-64; however, the defendant bears the burden of *production*, such that he is not entitled to a jury instruction on his proffered necessity defense unless he has presented *prima facie* evidence of necessity, *see Howley,* 128 Idaho at 878-79, 920 P.2d at 395-96.

Just as was done by the district court in Mr. Beavers' Second Case, some of the Idaho decisions addressing defendants' requests for jury instructions on the necessity defense have blended the jury instruction issue with the question of whether the defendant can even present his necessity defense. *See, e.g., Howley,* 128 Idaho 874, 920 P.2d 391; *State v. Chisholm*, 126 Idaho 319, 882 P.2d 974 (Ct. App. 1994). The theory behind this approach, it would seem, is that, if the defendant cannot produce sufficient evidence of his necessity theory to warrant a jury instruction, any evidence on that topic would be irrelevant. *Chisholm*, 126 Idaho at 322-23, 882 P.2d at 977-78.

Moreover, this blended approach makes a certain amount of sense given that both questions (whether evidence concerning the defense can be presented and whether the jury can be instructed) seem to call for the same inquiry: whether the defendant has presented *prima facie* evidence as to the four elements of the necessity defense. *See Tadlock*, 136 Idaho at 414, 34 P.3d at 1097; *Howley,* 128 Idaho at 878-79, 920 P.2d at 395-96, *Chisholm*, 126 Idaho at 322-23, 882 P.2d at 977-78.

As with the more narrow question of whether the defendant has presented *prima facie* evidence entitling him to a jury instruction on the necessity defense, the blended question of whether he is entitled to present that defense *and* receive a jury instruction on that defense, involves a question of law which Mr. Beavers submits is subject to *de novo* review. *See* Part I.B, *supra* (arguing that the question of whether a party has presented a *prima facie* case is typically judged under an objective standard and, thus, is typically considered to be a question of law, subject to *de novo* review); *see also State v. Sheldon*, 145 Idaho 225, 228, 178 P.3d 28, 31 (2008) ("The question of whether evidence is relevant is reviewed *de novo*, while the decision to admit relevant evidence is reviewed for an abuse of discretion).

C. Given The Facts Of Mr. Beavers' Second Case, The District Court Should Have Allowed Mr. Beavers To Present Evidence Relating To The Affirmative Defense Of Necessity, And It Should Have Instructed The Jury About That Defense

Taking an objectively reasonable view of the evidence presented by the defense in the Second Case, it is clear that Mr. Beavers satisfied his burden of production as to the four elements of the common law defense of necessity. Therefore, it was legal error for the district court to have precluded him from testifying as to his medical need for

marijuana, and to have declined to instruct the jury as to the availability and elements of the necessity defense.

1. Mr. Beavers Presented Evidence Of A Specific Threat Of Immediate Harm, *i.e.*, A Debilitating Gastrointestinal Condition

As he had while testifying in front of the jury in the First Case, during his offer of proof in the Second Case Mr. Beavers testified about his various medical conditions (irritable bowel syndrome, internal hemorrhoids, Hepatitis B and C, hypertension, anxiety, depression, and angina attacks) and the symptoms associated with some of those conditions (anal bleeding and discharge, bowel discomfort, constipation, and severe headaches). (Tr. Vol. VI, p.67, L.19 – p.68, L.1, p.73, Ls.10-17, p.84, L.24 – p.85, L.7.) Furthermore, Mr. Beavers testified that his medical problems had had a tremendously negative impact on his life. (Tr. Vol. VI, p.84, Ls.1-12.)

Surely Mr. Beavers' illnesses and their attendant symptoms, all of which had a profound impact on his life, constitute a "threat of immediate harm" within the meaning of *Hastings*. Indeed, the district court impliedly found that Mr. Beavers' health conditions did constitute a "threat of immediate harm" (*see* Tr. Vol. VI, p.131, L.8 – p.132, L.21) (concluding that Mr. Beavers would not be allowed to present his defense, and was not entitled to an instruction on the defense of necessity, because he failed to establish that he went to reasonable lengths to pursue medical attention before turning to marijuana and because, based on the State's evidence, the district court simply did not believe that Mr. Beavers was growing marijuana solely to remedy his own health problems)).

2. Mr. Beavers Presented Evidence Indicating That He Did Not Bring About The Harm (The Debilitating Gastrointestinal Condition) Necessitating His Illegal Act, *i.e.*, His Possession And Use Of Marijuana

Just as with the First Case, since the "specific threat of immediate harm" at issue in the Second Case was Mr. Beavers' illness, it was obviously not something that he brought about on his own.

3. Mr. Beavers Presented Evidence Showing That The Same Objective, *i.e.*, A Modest Recovery, Could Not Have Been Accomplished By A Less Offensive Alternative, *e.g.*, Traditional Medicine, That Was Actually Available, *i.e.*, Affordable, To Him

As with the First Case, the most critical element of the necessity defense with regard to the Second Case is the requirement that the same objective could not have been accomplished by any less offensive alternatives that were actually available to Mr. Beavers. Thus, the operative question becomes whether Mr. Beavers could have satisfactorily treated his gastrointestinal condition through conventional medicine.

Keeping in mind that Mr. Beavers' burden was only to *produce evidence* on this point, not to *persuade* the finder of fact, he submits that he met his burden by presenting *prima facie* evidence that he had no choice but to use marijuana to treat his gastrointestinal condition. As noted, in his offer of proof, Mr. Beavers testified that he had no health insurance (Tr. Vol. VI, p.81, Ls.7-8), he generally could not afford to see specialists or pay for emergency room visits (*see* Tr. Vol. VI, p.81, L.9 – p.82, L.23), and, when he did eventually seek traditional medical care for his condition, he received a medication that helped, but brought on a significant side effect (angina) that caused him to have to stop taking that medication. (Tr. Vol. VI, p.75, L.24 – p.79, L.5.) He further testified that he was eventually granted authorization by the State of Washington to use marijuana for medicinal purposes (Tr. Vol. VI, p.79, L.4 – p.80, L.20), and that the

use of marijuana, especially when combined with an improved diet and a regimen of exercise, yoga, and meditation, alleviated his symptoms and allowed him to function again (Tr. Vol. VI, p.83, Ls.16-25, p.85, L.21 – p.86, L.16, p.93, Ls.2-25, p.95, Ls.14-20, p.97, Ls.18-19, p.98, Ls.8-15).

The district court concluded that Mr. Beavers would not be allowed to testify about his illnesses and his medical need for marijuana, and that he was not entitled to a jury instruction on the defense of necessity, because he failed to establish that he went to reasonable lengths to pursue medical attention before turning to marijuana and because, based on the State's evidence, the district court simply did not believe that Mr. Beavers was growing marijuana solely to remedy his own health problems. (Tr. Vol. VI, p.131, L.8 – p.132, L.21.) This ruling, however, was incorrect. First, as noted above, Mr. Beavers testified that he could not afford to go to the doctor initially and, when he did eventually go, the conventional remedy provided was no remedy at all because it came with significant side effects. This was sufficient to satisfy Mr. Beavers' burden of *production*, even if it did not persuade the district court.

Second, insofar as the district court simply did not believe Mr. Beavers' testimony, as noted above in Part I.C.3, this type of weighing of the evidence is inconsistent the applicable legal standard, whereby only the burden of *production*, not the burden of *persuasion*, was on Mr. Beavers. Moreover, a district court simply cannot weigh the perceived strength of the State's evidence in determining whether the defendant ought to be allowed to present evidence in his defense. *Holmes v. South Carolina*, 547 U.S. 319, 329-31 (2006).

Had the district court applied the correct standard—the production of evidence standard—it would have had to have concluded that Mr. Beavers' presented *prima facie* evidence that he could not have treated his illness without marijuana, and it would have been up to the jury to decide whether that evidence was credible.

4. Mr. Beavers Presented Evidence Supporting The Conclusion That The Harm Caused, *i.e.*, Commission Of A "Victimless" Crime Of Morality, Was Not Disproportionate To The Harm Avoided, *i.e.*, Mr. Beavers' Continued Suffering And Incapacitation

Again, although the State can come up with a theoretical "societal harm" argument to try to justify the criminalization of the growing, possession, and use of marijuana, the fact is that, *in* this case, there is simply no evidence of anyone having actually been harmed by Mr. Beavers' medicinal use of marijuana. Moreover, given the harm avoided—Mr. Beavers' continued suffering and incapacitation—it cannot be said that the societal harm (assuming there is some) is disproportionate to the suffering that Mr. Beavers avoided.

The district court weighed the State's evidence heavily in finding that the harm caused was disproportionate to the harm avoided:

> There was no reasonable evidence submitted by the defense that, based upon the amount seized from the defendant and the number of plants involved and the fact that he was actually selling marijuana, that the harm caused by violating the law was less than the threatened harm. Certainly it's difficult to belief [sic] that he was simply growing for his own use when, at the same—if, at the same time as the evidence clearly shows, he was selling marijuana.

(Tr. Vol. VI, p.132, Ls.6-14.) However, as noted, the standard for determining whether Mr. Beavers had a right to present his necessity defense and was entitled to a jury instruction on the common law defense of necessity, did not call for the district court to weigh the evidence and base its decision on whether it thought Mr. Beavers was guilty.

See Holmes, 547 U.S. at 329-31. The correct standard was simply determining whether Mr. Beavers presented *prima facie* evidence. *State v. Camp*, 134 Idaho 662, 665-66 & n.2, 8 P.3d 657, 660-61 & n.2 (Ct. App. 2000). Clearly, he did.

III.

The District Court Erred At Mr. Beaver's Joint Sentencing Hearing By Enhancing Mr. Beavers' Sentences In The Second Case Based On Its Finding That He Had Been Previously Convicted Of Certain Drug Offenses In The First Case

A. Introduction

In the Second Case, the State pled four sentencing enhancements based on the allegation that Mr. Beavers had previously *"committed"* the drug crimes charged in the First Case. (R., pp.327-29 (original Information) (emphasis added), pp.596-89 (Amended Information) (emphasis added).) At the time that the original Information was filed, of course, the State could only allege that Mr. Beavers had "committed" the previous drug crimes because, at that point, Mr. Beavers had not actually been "convicted" of those crimes. (*Compare* R., pp.327-29 (December 21, 2007 Information in the Second case) *with* R., pp.562-64 (June 19, 2008 verdict in the First Case).)

The State ultimately proceeded with three of the four enhancements originally pled:

- I.C. § 37-2739, which would allow for sentences up to twice the sentences otherwise authorized on all three counts in the Second Case. Section 37-2739 applies to "[a]ny person *convicted* of or subsequent offense," and it specifically states that, "[f]or purposes of this section, an offense is a second subsequent offense, if, prior to his conviction of the

offense, the offender has at any time been convicted" of a drug offense. *Id.* (emphasis added).

- I.C. § 37-2739A, which would call for a mandatory minimum three-year fixed consecutive sentence on the delivery charge. Section 37-2739A applies to anyone "who has previously been *convicted* within the last ten (10) years" of any "dealing, selling, or trafficking" offense. This enhancement does not contain any kind of definition of what constitutes a previous conviction. *See id.* (emphasis added).
- I.C. § 37-2732(B)(a)(7), which would call for a mandatory minimum sentence twice that which was otherwise required on the trafficking charge. Section 37-2732(B)(a)(7) applies to any "second *conviction* for any trafficking offense . . . ." *Id.* (emphasis added).

(*See* Tr. Vol. VI, p.222, L.10 – p.229, L.2.) Eventually, the district court ruled that all three of those enhancements could be applied in the Second Case because, by then, Mr. Beavers had been found guilty, *i.e.*, "convicted," in the First Case. (Tr. Vol. I, p.1024, L.3 – p.1025, L.8.) Apparently, the district court took the approach that the foregoing enhancements apply so long as the "conviction," *i.e.*, guilty verdict, for the first offense(s) came about prior to the sentencing hearing for the second offense(s), without regard as to whether the "conviction" for the first offense predated the *commission* of the second offense. (*See* Tr. Vol. I, p.1024, L.3 – p.1025, L.8.)

Mr. Beavers submits that the district court's ruling was in error and that, in fact, the enhancements pled by the State cannot apply in this case because, at the time

Mr. Beavers *committed* the offenses alleged in the Second Case, he had no prior drug *convictions*.

B. Standard Or Review

The question of whether a sentencing enhancement based on a prior conviction can be applied to a crime alleged to have been committed before the prior conviction came about requires interpretation of the statute authorizing the enhancement. And, since the interpretation of a statute raises a question of law, the district court's ruling in this case is subject to *de novo* review. *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 176, 208 P.3d 149, 152 (2009).

C. Mr. Beavers' Sentences In The Second Case Could Not Be Enhanced Based On His Prior Convictions In The First Case Because Those Prior Convictions Did Not Exist At The Time That He Allegedly Committed The Offenses At Issue In The Second Case

Each of the three statutory enhancements at issue in this appeal is predicated upon the existence of a prior drug-related *conviction*. I.C. §§ 37-2739, -2739A, and -2732(B)(a)(7). Not one of these enhancements, however, is explicit as to what the prior conviction must be prior to. *See* I.C. §§ 37-2739, -2739A, and -2732(B)(a)(7). Must it prior to the commission of the subsequent offense? The filing of formal charges? The guilty plea or jury verdict? The sentencing hearing? Or formal entry of judgment?

In this case, the district court seems to have assumed that the prior conviction need only have been prior to the sentencing hearing in the subsequent case. (*See* Tr. Vol. VI, p.1024, L.3 – p.1025, L.10.) However, Mr. Beavers submits that the best reading of the enhancement statutes at issue in this appeal is that they require that

there have been one or more drug-related convictions prior to *commission* of the subsequent offense. Thus, Mr. Beavers contends that even if we are to assume that he was "convicted" of the offenses at issue in the First Case on June 19, 2008, the date the jury rendered its verdict in that case (R., pp.562),[15] those convictions cannot be used to enhance his sentences in the Second Case because those convictions did not exist on November 21, 2007, the date on which Mr. Beavers allegedly committed the offenses at issue in the Second Case.

Mr. Beavers' interpretation of the enhancement statutes is based on the idea that all such enhancements are designed to punish recidivism; they are intended to impose a harsher punishment on the defendant who, after having been previously convicted (and typically punished) for his first drug crime and, thus, given a strong warning, failed to learn his lesson and reform his behavior, and subsequently committed another drug crime. This is certainly the purpose of Idaho's "persistent violator" enhancement statute (I.C. § 19-2514), *see State v. Harrington*, 133 Idaho 563, 565, 990 P.2d 144, 146 (Ct. App. 1999); *State v. Clark*, 132 Idaho 337, 339, 340, 971 P.2d 1161, 1163, 1164 (Ct. App. 1998); *State v. Brandt*, 110 Idaho 341, 344, 715 P.2d 1011, 1014 (Ct. App. 1986), and it would seem to be the purpose of the enhancements at issue in this appeal.

Indeed, although it appears that the Idaho courts have not yet addressed the precise question involved in this case—whether a recidivism statute providing for

[15] Below, the State argued that under *United States v. Sharp*, 145 Idaho 403, 179 P.3d 1059 (2008), a guilty plea or a jury finding of guilt constitutes a "conviction," even if the defendant has not been sentenced and the district court has lodged no formal judgment of conviction. (R., p.665.) The district court agreed with the State on this point. (*See* Tr. Vol. VI, p.1024, Ls.3-18.)

enhanced penalties based on prior convictions applies to situations where the defendant was not actually convicted of the prior offense until after he committed the present offense—"[t]he rule in most jurisdictions with enhanced penalty statutes is that the prior conviction must precede the *commission* of the principal offense . . . ." *Gargliano v. State*, 639 A.2d 675, 683 (Md. Ct. App. 1994) (emphasis in original). *See, e.g., State v. Rastopsoff*, 659 P.2d 630, 641 (Ak. Ct. App. 1983) (holding that under Alaska's presumptive sentencing scheme, because the defendant committed three separate felonies before he was convicted of any of them, all three had to be treated as first convictions); *State v. Ahakuelo*, 683 P.2d 400, 403 (Haw. Ct. App. 1984) (holding that an enhancement for a prior DUI conviction did not apply where the defendant committed both DUIs before he was convicted of either); *People v. Phillips*, 502 N.E.2d 80, 81-82 (Ill. Ct. App. 3d Dist. 1986) (holding that an enhancement for a prior weapons conviction did not apply where the defendant committed both weapons offenses before he was convicted of either, and noting that "[a]n enhanced penalty should not be imposed until the offender has had the opportunity to reform after being punished for his first conviction"); *State v. Osoba*, 672 P.2d 1098, 1099-1100 (Kan. 1983) (holding that an enhancement for a prior DUI conviction did not apply where the defendant committed both DUIs before he was convicted of either); *Bray v. Commonwealth*, 703 S.W.2d 478, 479-80 (Ky. 1985) (holding that a habitual offender enhancement did not apply where the defendant committed his third felony before he was convicted of his second felony, and noting that the philosophy behind Kentucky's habitual offender statute is that "a person who commits a felony after having been convicted of a felony has doubt cast on his ability to be rehabilitated and that a person who commits a felony after having been

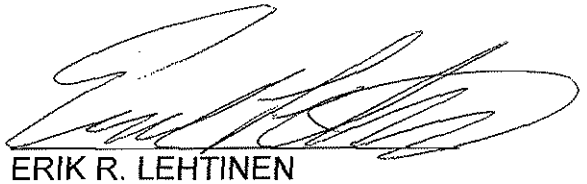
convicted of a felony the second time may well be incorrigible and deserving of more extended incarceration"); *State v. Nicholas*, 491 So.2d 711, 715 (La. Ct. App. 4th Cir. 1986) (holding that a habitual offender enhancement had not been proven to be applicable because the government had failed to demonstrate the latest prior conviction had actually occurred prior to the defendant's commission of the present offense); *Gargliano*, 639 A.2d at 683 (holding that an enhancement for a prior drug convictions did not apply where the defendant committed the principal (third) drug offense before he was convicted of either of the previous two drug offenses); *State v. Gehrke*, 474 N.W.2d 722, 726 (S.D. 1991) (holding that a habitual offender enhancement did not apply where the principal offense was committed while the defendant was out on bail awaiting trial for the prior offense because the defendant was not yet convicted for the prior offense); *State v. Brezillac*, 573 P.2d 1343, 1346 (1978) (holding that one cannot be deemed to be a habitual offender where the defendant was not convicted of the prior offense before he committed the principal offense, in part, because the purpose of the habitual offender enhancement is to punish those who have been granted a chance to reform but have failed to avail themselves of that opportunity).

Mr. Beavers urges this Court to follow the majority rule and give the sentencing enhancements at issue in this case a faithful, logical interpretation. Assuming it does so, it should hold that the convictions in Mr. Beavers' First Case could not be used to enhance his sentences in the Second Case and, therefore, Mr. Beavers is entitled to a new sentencing hearing.

CONCLUSION

For the reasons set forth above, Mr. Beavers respectfully requests that this Court vacate his convictions and remand both of his cases for new trials, wherein he will be allowed to present his necessity defense and have the respective juries instructed on the affirmative defense of necessity. In the alternative, Mr. Beavers requests that his sentences be vacated and his cases remand for a new sentencing hearing.

DATED this 4th day of December, 2009.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of December, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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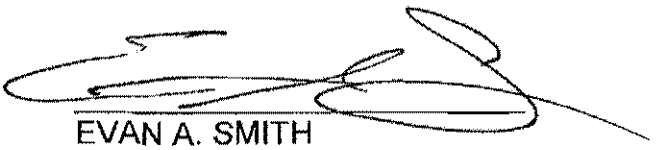

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